United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 30, 2003

TO : F. Rozier Sharp, Regional Director
Leonard P. Bernstein, Regional Attorney
Michael McConnell, Assistant to Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: ITT Industries Systems 133-5000
Case 17-CA-22030 530-6067-0150
530-6067-2000
530-6067-2060-1700
530-6067-2060-3300
530-8095

This Section 8(a)(5) case was submitted for advice as to whether the Employer engaged in bad faith bargaining for a first contract by proposing wages below the rate specified in its service contract with the Army.

We conclude that the proposal was not an illegal proposal, inasmuch as nothing in the Service Contract Act (SCA)[1] precluded the Employer from seeking, through collective bargaining, wages below the level embodied in the service contract. We also agree with the Region that the wage reduction proposal was neither intended to frustrate the bargaining process nor otherwise made in bad faith.

FACTS

The Employer has provided bus and truck driving services at the Fort Sill Army base near Lawton, Oklahoma under a federal service contract that first took effect in October 1997. The service contract was for an initial one year period with renewal options for four additional contract years. In January 2002,[2] the Union was certified to represent a single unit of the Employer's approximately 35 drivers. At the time, the unit bus and truck drivers were earning $10.87 and $12.89 per hour under the Employer's service contract with the Army.[3]

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[1] 41 U.S.C. § 351, et seq. (2003).

[2] All dates are in 2002, unless otherwise indicated.

[3] As detailed below, when a private contractor provides services to a federal agency, the procurement process and the service contract terms, including wages, are governed by

In March, the parties began negotiations for a first collective-bargaining agreement and after 17 bargaining sessions, by mid-November, had reached agreement on almost all subjects. The only major issue left for discussion was wages.

During the same period, the Employer's service contract was extended for an additional one year period, October 1, 2002 to September 30, 2003. Under the extended service contract, the applicable DOL wage determination[4] for the bus drivers increased to $12.36 per hour; the prevailing rate for truck drivers did not change, so their wage rate under the service contract stayed at $12.89.

The parties first addressed wages at a November 13 bargaining session. The Employer informed the Union that it had conducted its own wage survey and felt that the DOL wage determination was too high in comparison to the wages being paid for similar work in Fort Sill's immediate environs. The Employer presented the Union with a copy of its wage survey. The survey lists the hourly rates paid to school bus drivers by several public school systems in the Lawton vicinity and that paid by the Lawton municipal bus system. The Employer's proposal appears to be based on an approximate average of those wages. The basis for the Employer's proposed cut in the unit truck drivers' wage rate is unknown. The Union immediately protested that the wages reflected in the survey were too low and asserted that once DOL establishes the wage rate, service contract wages may not be reduced.

The next day, the Employer presented an opening wage proposal, incorporating wages significantly lower than the DOL-determined rates embodied in the October 1 service contract extension. The Employer proposed an entry level rate for bus drivers of $7.00 per hour, increasing to $9.00 after 180 days, a reduction of 43% and 27%, respectively, from the DOL-determined rate that had gone into effect on October 1. The Employer proposed reducing the unit truck drivers wages to $9.50 per hour, a reduction of 26%.

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the SCA and implementing regulations promulgated by the Department of Labor (DOL).

[4] In general, service contract wage determinations are established at the time a contract for services is offered for bids and cannot be altered except at annual renewal periods in multi-year service contracts ("follow-on" contracts), at the time of any extension, or at other intervals as specified in the particular service contract.

The Union strongly objected to the proposed reduction in wages and repeated its position that the Employer could not lawfully alter the rates determined by DOL. The parties met again that afternoon. Although the Employer modified its opening proposal somewhat,[5] the Union remained fixed in its objections and its claim that employee wages could not be reduced. The parties continued negotiating the next day without any movement. The November 15 session ended with the Employer stating that its "best and final offer" would follow.

On November 26, the Employer presented its "best and final offer" to the Union by e-mail. This complete collective-bargaining agreement included Article XIX, stating that "[o]n the date this agreement becomes effective," the hourly rate for bus drivers would range from $7.50 to $9.50, a slight increase over the November 14 proposal. The "best and final" rate for the truck drivers would be a flat $10.00, an increase of $0.75 per hour over the Employer's last proposal. The Union rejected the proposed contract. The parties have not met again in face-to-face negotiations or had any further communications about the collective-bargaining agreement.

Sometime in the weeks following the breakdown in negotiations, the Union met with the employees to explain what had happened. All but six unit employees attended this first meeting, and the discussion centered on wages. The employees were angry and upset. When asked what the Union was going to do about it, the Union said that the Employer could not change the DOL wage determination and promised that it would be reviewing the entire proposal.

The Union filed the instant charge on December 30. A short time later, it called a second employee meeting to inform the employees of the charge. Only nine employees attended this meeting, apparently because most of the employees were on leave for the holidays. The Union told them that it felt the Employer had engaged in bad faith bargaining. The employees in attendance approved the Union's actions.

On January 8, 2003, a decertification petition was filed in Case 17-RD-1661. That petition is blocked by the instant charge.

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[5] Thus, the modified November 14 proposal raised bus drivers' wages to a range of $7.25 to $9.25 per hour and reduced the proposed truck drivers' rate to $9.25.

The Union remains fixed in its position that the Employer could not, under the SCA, lawfully propose to change or change the DOL-determined wage rates incorporated in the extended service contract. It contends that the Employer has therefore unlawfully insisted to impasse on an illegal bargaining proposal.

The Employer denies that the parties are at impasse and has expressed its willingness to return to the bargaining table. It asserts that it presented the November 26 proposal as a "best and final offer" solely at the Union's insistence that it do so. The Employer also claims that it can (1) lawfully propose to reduce DOL-determined wages, and (2) upon reaching a collective-bargaining agreement with the Union, immediately substitute the collectively-bargained wage rates for the DOL-determined rate contained in the service contract.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, because there is no evidence that the wage reduction proposal was either (1) an illegal proposal made in violation of the Service Contract Act or (2) otherwise intended to frustrate the bargaining process or made in bad faith.

Section 8(d) of the Act requires employers and unions to bargain in good faith with respect to wages, hours, and other terms and conditions of employment.[6] Accordingly, the parties have a duty to approach collective bargaining, with a fair, open mind, and "a sincere purpose to find a basis of agreement . . . ."[7] Further, the Act does not permit parties to insist to impasse upon the inclusion of an illegal proposal as a condition of reaching an agreement.[8] The Board will find bad faith bargaining based on the content of lawful bargaining proposals only if the

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[6] Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-210 (1964), citing NLRB v. Borg-Warner Corp., 356 U.S 342, 349 (1958).

[7] NLRB v. Herman Sausage Co., 275 F.2d 229, 231, rehearing denied 277 F.2d 793 (5th Cir. 1960).

[8] See Eddy Potash, Inc., 331 NLRB 552, 552, 559 (2000), citing Massillon Community Hospital, 282 NLRB 675, 676 (1987)and National Maritime Union (Texas Co.), 78 NLRB 971, 981-982 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied, 338 U.S. 954 (1950).

proponent's bargaining position and other proposals "indicate an intention . . . to avoid reaching an agreement."[9] It will not otherwise evaluate the subjective content of particular proposals[10] or determine whether a given proposal is acceptable or unacceptable to the opposing party.[11] Rather, the Board will "consider whether, on the basis of objective factors, a demand [for a particular proposal or proposals] is clearly designed to frustrate agreement on a collective-bargaining contract."[12] Such objective factors can include implied or actual admissions of intent to prolong negotiations,[13] a failure to explain or justify proposals,[14] making proposals in a "take it or leave

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[9] Litton Systems, 300 NLRB 324, 326-327 (1990), enfd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992); see also A-l King Size Sandwiches, 265 NLRB 850, 859 (1982), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); Reichhold Chemicals, 288 NLRB 69, 69 (1988), enfd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991).

[10] See Litton Systems, 300 NLRB at 326-327.

[11] Reichhold Chemicals, 288 NLRB at 69.

[12] Ibid.

[13] See, e.g., Prentice-Hall, Inc., 290 NLRB 646, 646 (1988) (employer's lack of intent to reach agreement was reasonably inferred from the totality of its conduct, including a tactic of making sham concessions on demands that were then presented elsewhere in new employer proposals; the employer "behaved as if it was counting on the chance that the slim majority by which the Union won the election . . . and the passage of the certification year without any real prospect of a contract" would cause sufficient employee disaffection to permit a post-certification year withdrawal of recognition). Cf. Radisson Plaza Minneapolis, 307 NLRB 94, 94-95 (1992) (in finding surface bargaining, Board found employer's dealings with the union at and away from the bargaining table "were clearly calculated to impede bargaining and weaken the Union with a view to having it removed . . . rather than to reach agreement").

[14] See, e.g., Liquor Industry Bargaining Group, 333 NLRB 1219, 1221 (2001) (refusal to explain bargaining proposals beyond conclusory statements of a party's wants or need is a "significant manifestation of bad-faith bargaining"). Accord: Summa Health System, Inc., 330 NLRB 1379, 1379 (2000).

it" manner[15] or otherwise failing to comply with the procedural requirements of good-faith bargaining.[16]

We first conclude that the Employer's proposal to reduce wages was not an illegal proposal, inasmuch as the Employer was privileged, under the SCA and its implementing regulations, to seek a change in the service contract wage rate. Thus, while our review of the SCA, relevant regulations, and case law revealed no explicit authorization for the proposed wage reduction, we conclude that the regulatory structure clearly contemplates the substitution, at appropriate times, of collectively-bargaining wage rates for locality based wage rates originally determined by DOL.[17]

The Service Contract Act (SCA) provides wage protection for "employees of contractors and subcontractors furnishing services to or performing maintenance services for Federal Agencies."[18] Under SCA Section 2(a)(1), the minimum wages to be paid by a service contractor are established in one of two ways,[19] either through a wage determination issued by the

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[15] See, e.g., 88 Transit Lines, 300 NLRB 177, 179 (1990) ("if a party is so adamant concerning its own initial positions on a number of significant mandatory subjects, we may properly find bad faith evinced by its "take-it-or-leave-it" approach").

[16] See generally Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984) (listing indicia of bad faith bargaining, including: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory bargaining subjects, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings).

[17] The Union's contention that the Employer could not seek a change in the contract wage rates is based upon an erroneous reading of 29 CFR § 4.56. While that regulation sets forth procedures for challenging a DOL wage determination at the time the determination is rendered, it does not support the Union's claim that those procedures are the exclusive means of changing a service contract wage determination under the SCA, or preclude a service contractor from seeking a lower wage rate through collective bargaining.

[18] S.Rep. No. 798, 89th Cong., 1st Sess. (1965).

[19] See 29 CFR § 4.50 ("[t]he [DOL Wage and Hour Division] Administrator specifies the minimum . . . wages . . . to be

DOL,[20] or through a valid collective bargaining agreement. Thus, in the case of a newly offered service contract or a successor service contract where the predecessor contractor's employees were unrepresented,[21] the DOL prevailing locality rate determination will be incorporated as the service contract's wage term.[22] If the employees of the successful bidder are represented and covered by a collective-bargaining agreement, or if the successful bidder negotiates a collective-bargaining agreement during the term of its service contract, the negotiated wage rates will become the "applicable wage determination" governing the service contract's wage term, but not until the next time the service contract wage provision is adjusted.[23] And, while service contractors may not pay their employees less than the wage rates specified in a service contract during its term,[24] we find no clear provision in the SCA or the DOL

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paid as required under the [SCA] in two types of determinations").

[20] The Wage and Hour Division determines the prevailing wage rates for innumerable job classifications in specified localities throughout the country, and periodically publishes wage determinations that establish the minimum wages to be paid under service contracts entered into in the applicable locality.

[21] Under the SCA, the terms "predecessor" and "successor" do not have the same meaning they have under the NLRA. Under the SCA, a predecessor is the prior service contractor and a successor is the service contractor who obtains the contract to performing substantially the same work. A service contractor thus can be its own predecessor and successor under succeeding service contracts. See 29 CFR § 4.163(e).

[22] See generally 29 CFR § 4.3 (providing that wage determinations shall be issued "for all contracts subject to [SCA § 2(a)]").

[23] See, e.g., 29 CFR § 4.4(c) (requiring contracting agency to attach to its proposal for a successor service contract copies of any applicable collective bargaining agreements); 29 CFR § 4.1b(b)(1) and (2) (setting forth circumstances in which terms of new or changed collective-bargaining agreements will <u>not</u> be incorporated into bids for or awards of successor service contracts).

[24] See SCA § 3(a) ("[a]ny violation of any of the contract stipulations required by [§ 2(a)(1)] shall render the party responsible therefore liable for a sum equal to the amount of any . . . underpayment of compensation due any employee engaged in the performance of such contract . . . "). See

regulations that expressly precludes a service contractor from negotiating wages below the DOL prevailing area rates and using that negotiated rate to seek an adjustment in the service contract wage term.

Indeed, a decision by DOL's Administrative Review Board (ARB) demonstrates that a SCA employer may collectively bargain wage rates lower than the DOL prevailing area rate.[25] In that case, the union claimed that a newly-issued DOL "area wage determination" should apply to the covered employees, even though it had negotiated a lower wage rate in a collective-bargaining agreement with the service contract employer during the preceding service contract term. The ARB held that the collectively bargained wage rate should apply to the contractor's employees in the new ("follow-on") contract period, even though that rate was lower than the prevailing wage rate established by DOL for that locality. The ARB explained that the SCA and its regulations provide two mutually exclusive mechanisms for establishing service contract wage provisions: (1) the "prevailing in the locality" wage rate as determined by DOL, or (2) the collectively-bargained wage rate.[26] Accordingly, the negotiated lower wage rate became the "applicable wage determination" of the follow-on service contract.[27]

In light of AKAL, it seems clear that when a service contractor enters a collective-bargaining agreement during the term of a service contract, the negotiated rates may become the wage determination for the "follow-on" contract at the next service contract period. It therefore appears that nothing in the SCA would preclude the Employer from negotiating a wage rate lower than the DOL-determined prevailing rate for the locality. And if it was not unlawful to negotiate a lower wage rate, we cannot say that it was unlawful to propose a lower rate.

It seems equally clear, however, that the Employer could not implement such a reduced rate during the term of

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also 29 CFR § 4.183 (requiring notice to employees of compensation required under SCA § 2(a)(1)) and 29 CFR § 4.187(a) (implementing SCA § 3(a)'s proscription against underpayment).

[25] In the Matter of United Gov't Security Officers of America, Local 80 (AKAL Security), ARB Case No. 00-030, 2000 WL 1273986 (DOL Admin.Rev.Bd. Aug. 31, 2000).

[26] Id. at *4, citing 41 U.S.C. § 351(a)(1)(SCA § 2(a)(1)) and 29 CFR §§ 4.3, 4.4, 4.50.

[27] Id. at *4.

the current service contract since SCA regulations prohibit service contractors from paying their employees less than the incorporated wage determination during the term of the service contract.[28] Therefore, even if the Employer obtains the Union's agreement on lower wages, it would be required to wait until the end of the current service contract extension, i.e., September 30, 2003, to implement them. However, the fact that the Employer could not immediately implement lower negotiated wages does not mean that the Employer bargained in bad faith by proposing them. As shown above, if the Employer had obtained the Union's agreement to lower the wages, those wages would have become the "applicable wage determination" for the next service contract period.

We have considered and rejected the argument that the Employer's further proposal to implement the wage reduction "[o]n the date this agreement becomes effective" evinces bad faith. As shown above, the Employer is clearly mistaken that the SCA would permit implementation during the term of the Ft. Sill service contract. However, the Union has never challenged this aspect of the Employer's position concerning its rights under the SCA. Indeed, the Union is operating under the equally mistaken understanding that the Employer's sole recourse lawfully to implement a wage lower than the DOL-determined prevailing locality rate is to submit to DOL's challenge procedures. In the absence of evidence that the Employer's announcement of its intention to implement immediately was a purposeful misstatement of the law designed to undermine bargaining or mislead the Union or the employees, we would not find the statement to be evidence of bad faith.

We further conclude that the Employer has not otherwise engaged in bad faith bargaining. Thus, the Employer's conduct in bargaining, including the 17 bargaining sessions in which the parties exchanged and reached agreement on numerous subjects prior to the presentation of the wage reduction proposal, evinces an overall attempt to reach an agreement with the Union. There is nothing in the Employer's conduct at or away from the bargaining table that provides an objective basis for concluding that the Employer sought to avoid reaching agreement on a contract. There is nothing to suggest that the wage proposal was intended to delay agreement, and the Employer's reasons for seeking the wage reduction were explained to the Union and justified by

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[28] See n. 24, supra.

its own wage survey.[29] Nor did the Employer make the Union's acceptance of the wage reduction proposal a "take it or leave it" proposition that would indicate its bad faith. Rather, the Employer modified its opening proposal three times in response to the Union's objections. While these small modifications may have been inadequate from the Union's perspective, that does not mean the Employer's proposal was made in bad faith, and the Employer remains willing to return to the table for further bargaining. Indeed, the Union's opposition to any deviation from the DOL-determined wage rates contained in the service contract was so fixed and unchanging, that it could be said to be as or more responsible than the Employer for the breakdown in negotiations in November.[30] Thus, although the Employer has evinced its willingness to continue bargaining, the Union has not asked for the Employer to return to the table. In the absence of conduct suggesting that the Employer's wage reduction proposal was undertaken in order to frustrate agreement, the burden of establishing that the Employer has engaged in bad faith bargaining cannot be sustained.

In sum, because DOL would permit the Employer to seek lower wages in bargaining, the Employer's decision to do so rather then challenge the DOL area wage determination[31] is not illegal or evidence of bad faith. Nor is there any other evidence to indicate that the Employer proposed the lower wages to undermine the Union. We therefore conclude that the Employer did not engage in bad faith bargaining by merely proposing a wage package lower than the prevailing area rates. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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[29] We also have no reason to question the legitimacy or accuracy of the Employer's survey. Cf. Concrete Pipe, 305 NLRB 152, 153 (1991)("[a]n employer's desire to bring its labor costs in line with its competitors, standing alone, is not an illegitimate bargaining goal").

[30] Cf. 88 Transit Lines, 300 NLRB at 177-178 (rejecting bad faith bargaining allegation where employer and union were each responsible for their abbreviated and unproductive bargaining sessions).

[31] See n. 17, supra.